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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 158.

JOEL B. EARHARDT, PLAINTIFF IN ERROR,

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING AND AUGUST KRILLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED NOVEMBER 14, 1881.

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1 Pleas in the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Plaintiff in Error,
vs.
ANTHONY BOARO *et al.*, Defendants in Error.

In Ejectment.

2 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered, that heretofore, and on, to wit, the 2nd day of April, A. D. 1881, came Joel B. Erhardt, by Messrs. M. B. Carpenter, Jas. M. Sample, and Wells, Smith & Macon, his attorneys, and filed in said court his complaint in ejectment, and sued out of said court a writ of summons against Anthony Boaro, W. L. Hull, Eugene B. Cushing, August Krille, and ——— Hollabough.

The said complaint being in words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Plaintiff,
vs.
ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING, AUGUST KRILLE, and ——— HOLLABAUGH, Defendants.

3 The plaintiff complains of the said defendants, for that, heretofore, to wit, on the 17th day of June, 1880, the plaintiff was possessed of that certain mining claim situated in the county of Dolores, then the county of Ouray, in the State of Colorado, and within the said district, located and known as the Hawk lode, in Pioneer Mining District, being 1500 linear feet, horizontal measurement, in length, by 300 feet in width, situate upon the divide between Horse gulch and the West Dolores river, about four and one-half miles northwesterly from the town of Rico, in the said county of Dolores, bounded and described as follows, to wit: Beginning at corner number one, a well-marked post, being the northeast corner of said claim, whence bear spruce post six inches in diameter S. 2° E. three feet distant, Elliot mountain north 67° 25′ east, and Monument peak north 42° 35′ east; thence west 300 ft. to northwest corner No. 2; thence south 750 feet to west side center post and 1,500 ft. to southwest corner No. 3, whence bears a prominent peak north 37° east and spruce post 15 inches in diameter north 72° west, 20 feet distant; thence east 300 feet to southeast corner No. 4, whence bears spruce post 15 inches in diameter south 55° east, 5

feet distant; thence north 750 feet to east side center post
4 and 1,500 feet to northeast corner No. 1, the place of beginning. From the discovery shaft Expectation Mountain bears S. 39° 5′ E.

Which said premises plaintiff is entitled to occupy and possess by virtue of the location thereof, in pursuance of the laws of the United States and of the State of Colorado, and the local laws, rules, and customs of miners of the said Pioneer Mining District, and by virtue of the actual prior possession thereof. And the said plaintiff being so possessed of the said premises, and entitled thereto, the said defendants afterwards, to wit, on the 30th day of June, A. D. 1880, wrongfully entered into said premises and ousted the plaintiff, and now unlawfully withholds from the plaintiff possession thereof, to the damage of plaintiff in fifty thousand dollars.

And the plaintiff says that he, the said plaintiff, is a citizen and resident of the State of New York, and that the said defendants are, and each of them is, a citizen and resident of the State of Colorado; that the said premises exceed five thousand dollars in value.

2. And for a second cause of action plaintiff says that heretofore, to wit, on the 17th day of June, A. D. 1880, the said
5 plaintiff being possessed of the same premises in the first cause of action before described, the said defendants, afterwards, to wit, on the 30th day of June, A. D. 1880, wrongfully entered into possession thereof and ousted the plaintiff, and began to work and mine therein, and dug and removed therefrom divers large quantities of gold and silver-bearing ore, to wit, two hundred tons or thereabouts, of great value, to wit, of the value of fifty thousand dollars, to the damage of the plaintiff in fifty thousand dollars. And the plaintiff further saith that the said plaintiff is a citizen and resident of the State of New York, and that the defendants are, and each of them, is, a citizen and resident of the State of Colorado.

Wherefore the plaintiff prays judgment against the defendants for the possession of the said premises, and for one hundred thousand dollars, his damages aforesaid, and his costs.

M. B. CARPENTER,
JAS. M. SAMPLE,
WELLS, SMITH & MACON,
Pl'ff's Att'ys.

6 And afterwards, and on, to wit, the aforesaid 2nd day of April, 1881, a summons was issued, in words and figures following, to wit:

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

JOEL B. ERHARDT, Plaintiff,
vs.
ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING, AUGUST KRILLE, and ——— HOLLABAUGH, Defendants.

Complaint filed in the Clerk's Office this 2d day of April, 1881.

The President of the United States of America to the above-named defendants, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court by Joel B. Erhardt, plaintiff, against you as defendants, to recover the possession of certain specific real property situated in the county of Dolores, in the State of Colorado, to wit, the Hawk lode, in Pioneer Mining District, and for the sum of one hundred thousand dollars damages, and for costs of suit.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall [be] served on you, if such service shall be made within the county of Arapahoe, otherwise within forty days from the day of service; and if you fail to do so, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief therein demanded.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 2nd day of April, A. D. 1881, and of the Independence of the United States the 105th year.

[L. S.] EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

And upon the foregoing summons is the following endorsement, to wit:

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

RICO, COL., *May 23d*, A. D. 1881.

I hereby certify that I received the within writ on the 11th day of May, A. D. 1881, and that I have personally served the same upon Anthony Boaro, ——— Hollabaugh, W. L. Hull, Eugene B. Cushing, four of the said defendants, by delivering to each of them personally a true copy of the within writ, at the day and time as follows: As to Anthony Boaro and ——— Hollabaugh, at Rico, county of Dolores, on the 11th day of May, A. D. 1881; as

to W. L. Hull, served May 12th, 1881, and Eugene B. Cushing, May 23d, 1881, both in Dolores county, Colorado; as to August Krille, not found. This writ, therefore, returned partly served, as the law directs, this 30th day of May, A. D. 1881.

Marshal's fees:

Service, 4 def'ts, at 2.00 ea., 8.00.

P. P. WILCOX, *Marshal*,
By ISAAC YAHO,
Deputy Marshal.

And afterwards, and on, to wit, the 4th day of April, A. D. 1881, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his precipe for and sued out of said court a second summons, the said second summons being in words and figures following, to wit:

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

JOEL B. EARHARDT, Plaintiff,
vs.
ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING, AUGUST KRILLE, and ——— HOLLABAUGH, Def'ts.

Complaint filed in the Clerk's Office this 2d day of April, A. D. 1881.

9 The President of the United States of America to the above-named defendants, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court by Joel B. Erhardt, plaintiff, against you as defendants, to recover the possession of certain specific real property situated in the county of Dolores, in the State of Colorado, to wit, the Hawk lode, in Pioneer Mining District, and for the sum of one hundred thousand dollars damages and for costs of suit.

You are hereby required to demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe, otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief therein demanded.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the cir-
10 cuit court at the city of Denver, in said district, this 4th day of April, A. D. 1881, and of the Independence of the United States the 105th year.

[L. S.] EDWARD F. BISHOP, *Clerk.*

The aforesaid summons being returned and filed April 8, 1881, with the following endorsement thereon:

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

TRINIDAD, COLO., *Apr.* 6, 1881.

I hereby certify that I received the within writ on the 6th day of April, A. D. 1881, and that I have personally served the same upon August Krille, one of said defendant-, by delivering to him personally a true copy of the within writ at the day and time as follows: As to August Krille, at Trinidad, county of Las Animas, on the 6th day of April, A. D. 1881; as to Anthony Boaro, W. L. Hull, and Eugene B. Cushing, defendants herein, not found. This writ, therefore, returned served, as the law directs, this 8th day of April, A. D. 1881.

Marshal's fees:

Service, 1 def't	2 00
Mil-age, 2 mi.	12
Postage	12
	$2 24

P. P. WILCOX, *Marshal,*
By H. H. PEARSON,
Deputy Marshal.

11 And afterward, and on, to wit, the 21st day of June, A. D. 1881, came the said defendants, by Messrs. Markham & Patterson, their attorneys, and filed in said court and in said cause their motion to transfer cause to Del Norte for trial, and also filed the affidavit of T. M. Patterson in support of said motion. The said motion being in words and figures following, to wit:

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT *vs.* ANTHONY BOARO *et als.*

Come now the said defendants, by Markham, Patterson & Thomas, their attorneys, and move the court that the above-entitled cause be transfer-ed to the said court at Del Norte for trial, that the same may be tried at the term of said court to be holden at Del Norte in September, A. D. 1881, and for cause the said defendants refer the court to the affidavit of T. M. Patterson, filed herewith.

MARKHAM, PATTERSON & THOMAS,
Defendants' Attorneys.

12 The aforesaid affidavit of T. M. Patterson being in words and figures following, to wit:

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT *vs.* ANTHONY BOARO *et als.*

STATE OF COLORADO, } ss.
County of Arapahoe, }

T. M. Patterson, being first duly sworn, on his oath deposes and says: He is one of defendants' attorneys in above cause; that he has freely conversed with each of said defendants, and has learned the facts of said cause; that he is satisfied that the fair and full trial of the facts in issue will require the presence and examination of a large number of witnesses; that the facts to be testified to all transpired in the immediate vicinity of the mines in controversy and the town of Rico, in the county of Dolores; that it is the wish of defendants to have the witnesses testify before the jury which tries said cause; that there will be from eight to twelve witnesses to testify in behalf of defendants; that these witnesses, as affiant is in-
13 formed and verily believes, all reside in the said Dolores county, and affiant does not know of any witnesses in defendants' behalf residing out of said county. Affiant is informed that nearly all, if not all, of plaintiff's witnesses reside or are prospecting in the said Dolores county or in its immediate vicinity. Affiant further says that by trying said cause at the said town of Del Norte the witnesses therein will be saved more than two hundred miles of travel, and defendants and he believes the plaintiffs will be saved great and unnecessary outlays of money, and the witnesses and parties be saved great inconvenience and loss of time.

T. M. PATTERSON.

Subscribed and sworn to before me, this 21st day of June, A. D. 1881.

[L. S.] EDWARD F. BISHOP, *Clerk.*
By F. W. TUPPER, *Dep. Clerk.*

And afterwards, and on, to wit, the 5th day of July, A. D. 1881, came again the said defendants, by their attorneys aforesaid, and filed in said court and in said cause their answer to the complaint heretofore filed herein. The said answer being in words and figures following, to wit:

14 THE UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for said District.

JOEL B. ERHARDT, Plaintiff,
vs.
ANTHONY BOARO *et als.*, Defendants.

The answer of Anthony Boaro, W. L. Hull, Eugene B. Cushing, and August Krille, four of above-named defendants.

The said defendants, for answer to the complaint herein, say they

deny that on the 17th day of June, A. D. 1880, or at any other time, the plaintiff was possessed of the mining claim and lode described in said complaint as the Hawk lode; they deny that plaintiff is entitled to occupy and possess said premises by virtue of the location thereof, or for any other cause or reason; they deny that on the 30th day of June, A. D. 1880, or at any other time, they wrongfully entered into said premises; they deny that they ever at any time ousted the plaintiff from said premises; they deny that they
15 now, or ever at any time, unlawfully withholds from the plaintiff possession thereof, and they deny that by withholding said premises from the plaintiff he has been damaged in the sum of fifty thousand dollars, or in any other sum.

That as to whether or not the plaintiff is a citizen of the State of New York, or was such at the time of the commencement of this action, they cannot say, nor can they obtain sufficient information upon which to base a belief; they therefore demand strict proof of same.

And for answer to the second cause of action said defendants say: They deny that the defendants were ever at any time possessed of the said Hawk lode or claim; they deny that they ever at any time wrongfully entered into possession thereof; they deny that they ever at any time ousted the plaintiff therefrom; they deny that they have ever dug or removed therefrom any ore whatsoever, or of any value whatsoever, or to the damage of plaintiff in any sum whatsoever.

And for further answer to the complaint herein said defendants aver that heretofore, to wit, upon the 30th day of June, A. D. 1880, the defendants, Anthony Boaro and Wm. L. Hull, discovered
16 upon the unappropriated public domain of the United States a certain lode or vein of rock in place bearing silver, and thereupon, and within 60 days from the day of discovery, they run a certain open cut from the surface and at a depth of more than ten feet from the surface; in the face of said open cut they discovered a well-defined crevice of rock in place bearing silver, which was the same lode or vein discovered as aforesaid; that thereafter, and within less than 90 days from the discovery thereof, they located the said lode, (1) by running the said open cut as aforesaid, (2) by posting at the point of discovery on the surface a plain sign or notice containing the name of the lode, to wit, the Johnny Bull lode; the names of the locators, to wit, Anthony Boaro and W. L. Hull; and the date of discovery, to wit, June 30th, 1880; (3) by marking the surface boundaries of the claim with six substantial posts, hewed or marked on the sides in towards the claim and sunk in the ground, to wit, one at each corner and one at the center of each side line thereof; that thereafter, and within three months from the date of said discovery, they recorded the said claim in the office of the re-
17 corder of Ouray county, Colorado, (the said lode or claim being situated in what was then a part of Ouray county, but is now a part of Dolores county, Colorado,) by filing therein a location certificate, which contained the name of the lode, to wit, the Johnny Bull lode; the names of the locators, to wit, Anthony Boaro and W. L. Hull; the date of location; the number of feet in length claimed on each side of the centre of the discovery shaft, and the gen-

the plaintiff filed a motion to retax costs of witnesses, the said motion being in words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the District of Colorado

JACOB ERHARDT, Pl'tff. } Ejectment.
vs.
ANTHONY BOARO *et als.*; Def'ts. }

Now come the said plaintiff, by his attorneys, Wells, Smith,
23 & Macon and J. M. Sample, and move the court here to retax the costs in the above-entitled cause, and for grounds assign the following, to wit: 1st. That milage fees have been taxed in said cause against the plaintiff in favor of defendants' witnesses, from Rico, in Dolores county, Colorado, their place of residence, to Del Norte, the place of trial and return, when in fact none of said witnesses were served with writs of subpœna at said Rico, nor until their arrival at Nel Norte, when and where it appears that said writs were not served at all otherwise than by endorsements thereon of the said witnesses' acknowledgment of service.

2nd. That in re-coning mileage from said town of Rico to Del Norte the clerk allowed fees to said witnesses for two hundred and eighty miles each way between said points, when in fact there is a usually traveled route over good wagon roads between said points by which the distance does not exceed one hundred and fifty miles.

3d. That the clerk taxed mileage and attendance fees in favor of one J. R. Hollabough, who is one of the defendants in this cause.

Respectfully submitted.

WELLS, SMITH & MACON &
J. M. SAMPLE, *Pl'tff's Att'ys.*

24 And afterwards, to wit, upon the aforesaid 14th day of September, A. D. 1881, the parties filed a stipulation in said court in said cause in words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Plaintiff. } Ejectment.
vs.
ANTHONY BOARO *et al.*, Defendants. }

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the same be transferred to Pueblo, and be set for second trial on Tuesday, the 27th day of September, 1881, on payment by pl'tff of costs of first trial. It is also stipulated and agreed that on the trial of said cause, the affidavit of Allen Binns, now on file in the chancery cause pending in said court between the

parties to this cause, may be admitted in evidence as the testimony of said Binns on the part of the plaintiff herein.

WELLS, SMITH & MACON & J. M. SAMPLE,
Atty's for Pl'ff.
THOMAS PATTERSON & JULIUS THOMPSON,
Att'ys for Def'ts.

25 And afterwards, to wit, on the aforesaid 14th day of September, 1881, the following proceedings were had and done and entered of record in said court, to wit:

JOEL B. ERHARDT
vs. } Ejectment.
ANTHONY BOARO *et als.*

This day come the said parties by their attorneys, and the said plaintiff moves the court to re-tax the costs herein as in his said motion expressed, and it is ordered that the said motion stand for hearing at some other day; thereupon the said plaintiff having paid the costs herein as taxed, on his motion the judgment herein entered is by the court vacated and set aside; and it is ordered, the parties assenting thereto, that another trial of the issues joined herein, pursuant to the statute in such case made and provided, be had and held at Pueblo, in said district, on Tuesday, the 27th inst., and the parties assenting thereto, this cause is transferred to the circuit court sitting at Pueblo for further proceeding therein, according to law, and the clerk shall certify the transcript filed in
26 this court, together with a transcript of the record of the proceedings of this court, to the said circuit court, sitting at Pueblo, without delay. And it is further ordered that each of said parties have process of subpœna out of this court, returnable to the said court at Pueblo, to secure the attendance of witnesses as they may desire.

And afterwards, to wit, upon the 15th day of September, 1881, the clerk of the court at Del Norte attached to a transcript of the record a certificate in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

(Sitting at Del Norte.)

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify that the above and foregoing is a true, perfect, and complete transcript and copy of all the orders had and entered of record in said court and in the said cause in said court then pending, wherein Joel B. Erhardt is plaintiff and Anthony Boaro and others are de-
27 fendants, as fully and completely as the same now remains of record in my office. And I do further certify that the paper writings hereto attached are all the papers heretofore filed in said court in said cause.

In testimony whereof, I hereunto sign my name and affix the

seal of said court, at Del Norte, in said district, this 15th day of September, A. D. 1881.

[L. S.] EDWARD F. BISHOP, *Clerk*,
By JAMES W. ROSS, *Deputy*.

28 Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Pueblo.

Be it remembered, that on the 27th day of September, A. D. 1881, the same being one of the regular judicial days of the special September term of the circuit court of the United States for the District of Colorado, sitting at Pueblo, there were present Honorable Moses Hallett, district judge, P. P. Wilcox, marshal, by S. W. Cantril, deputy, and Edward F. Bishop, clerk of said court, by Mark G. Bradford, deputy clerk, when the following, among other, proceedings were had and done and entered of record in said court, to wit:

JOEL B. ERHARDT
vs. } Ejectment.
ANTHONY BOARO *et als.*

On this day come the plaintiff, by Thomas Macon, Esq., his attorney, and the defendants, by Thomas Patterson, Esq., & Julius Thompson, Esq., their attorneys, also come; thereupon the respective
29 parties say they are ready for trial.

Thereupon come a jury of twelve good and lawful men of the district, to wit, Beaufort Carpenter, Anastacio Valdez, Jacob Hisey, Rudolph Jeskie, M. B. Irvine, Wm. H. Fisher, Wm. C. Burdick, Benj. Doss, H. Pope, Jr., Henry Walker, Jas. Clelland, M. D. Swisher, who were duly empaneled, tried, and sworn to try the mattors at issue herein, joined between the parties in this cause, and heard part of the evidence.

And afterwards and upon, to wit, the 28th day of September, 1881, the same being one of the days of the September term, 1881, aforesaid, the following proceeding was had, to wit:

JOEL B. ERHARDT
vs. } Ejectment.
ANTHONY BOARO *et als.*

On this day come the respective parties, by their attorneys, and the jury heretofore empaneled and sworn in this cause also come, and further evidence is heard herein. After hear-
30 ing evidence of plaintiff, defendants' counsel move the court for judgment of nonsuit. After argument of counsel, it is considered by the court that said motion be denied, and evidence on the part of defendants is heard by the jury.

And afterwards, on, to wit, the 29th day of September, 1881, the following proceeding was had and entered of record, to wit:

JOEL B. ERHARDT
vs. } Ejectment.
ANTHONY BOARO *et als.*

On this day come the parties by their respective attorneys, and the jury heretofore empaneled and sworn in this cause also come, and evidence on the part of defendants is heard by the jury.

And afterwards, on, to wit, the 30th day of September, 1881, the following proceeding was had and entered of record, to wit:

JOEL B. ERHARDT
vs. } Ejectment.
ANTHONY BOARO *et al.*

On this day come the parties by their respective attorneys,
31 and the jury heretofore empaneled and sworn to try the matters at issue in this cause also come, and conclusion of the evidence and argument of counsel are heard by the jury.

And afterwards, on, to wit, the 1st day of October, 1881, the following proceeding was had and entered of record, to wit:

JOEL B. ERHARDT
vs. } Ejectment.
ANTHONY BOARO *et al.*

This day come the said parties, by their respective attorneys, and the jurors heretofore empaneled and sworn to try the matters at issue in this cause also come, and after hearing the instructions of the court, the jurors aforesaid retire to their room in charge of a sworn bailiff to consider of their verdict. Afterwards, and on the same day, came again the said jurors in the presence of the parties and the court, and on their oaths say, "We, the jury, find for the defendants."

Then came the said plaintiff and moved the court for a new
32 trial of the issues joined herein; and the said defendants also came, and after argument of counsel it is considered by the court that the said motion be denied. And it is further considered that the said defendants go hence hereof without day, and that they recover of and from the said plaintiff their costs and charges by them about their defence in this behalf expended to be taxed, and that they have execution therefor.

And on motion of the said plaintiff day until thirty days is given him to prepare and tender to the judge presiding at the trial his bill of the exception by him reserved at the trial of this cause, and when so tendered and filed the said bill of exceptions shall have force and effect as of this day.

Then came again the said plaintiff, by his attorney, and his motion to retax the costs of witnesses at the former trial of this action is heard, and, after argument of counsel, it is considered by the court that said motion be denied.

33 And upon the aforesaid 1st day of October, 1881, the plain-

tiff filed in said court, and in said cause, his motion for new trial, heretofore referred to, in words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of Colorado. } ss:

In the Circuit Court of the United States for the District of Colorado.

JOEL B. EARHARDT, Plaintiff,
vs.
ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING, AUGUST KRILLE, and —— HOLLABOUGH, Defendants.

And now comes the plaintiff, by Thomas Macon, Jas. M. Sample, and H. C. Thatcher, his attorneys, and move the court to set aside the verdict of the jury in said cause, and for a new trial, because—

1st. The court admitted improper evidence to go to the jury, &c.

34 2nd. The verdict of the jury is contrary to the law and the evidence of the case.

3d. The court erred in giving to the jury instructions numbered 1st, 2nd, 3d, 4th, 5th, and 8th, and each and every of them.

4th. The court erred in instructing the jury as follows: If you find that notice was posted, as testified by Carroll, you should also find that it was sufficient for the purpose for which it was designed, with this modification. It is in evidence, and it seems to be conceded by plaintiff that the notice on the stake contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom. In this respect the notice was deficient, and under it the locators could not claim more than the very place in which it was planted, elsewhere, on the same lode or vein, if it extends beyond the place in controversy, any other citizen could make a valid location, for this notice specifying no bounds or limits cannot be said to have any extent beyond what would be necessary for sinking a shaft.

35 5th. The court erred in instructing the jury as follows: If, by the use of reasonable diligence, the plaintiff and Carroll could have obtained possession for the purpose of doing necessary work, it was their duty to use such diligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand. But they were not bound to attempt to do the work at any other place than that which had been selected by Carroll, nor were they bound to use force to gain possession, or even to bring an action therefor. If they were excluded by Boaro and Hull from the possession of the very place selected by Carroll for his discovery cut or shaft, with intent on the part of the latter to hold the ground against them, it is enough on this point.

THOS. MACON,
JAS. M. SAMPLE,
H. C. THATCHER,
Plaintiff's Att'ys.

36 And on the aforesaid 1st day of October, 1881, a stipulation was filed in said court in said cause, in words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Plaintiff, *vs.* ANTHONY BOARO *et als.*, Defendants.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, for the purpose of determining the mileage fees to be taxed as costs in said cause, that the first trial in said cause was had at Del Norte, on September 13th, 1881. And thereupon, by stipulation, the second trial was to be had at Pueblo, commencing September 27th, 1881. That mileage fees were taxed in said first trial in said cause in favor of defendants' witnesses, at the rate of fifteen cents per mile for each mile of distance between the town of Rico, in said State, and the town of Del Norte, the
37 place of trial, traveled by said witnesses from Rico, their place of residence, to Del Norte, the place of trial, and from Del Norte, the place of trial, to Rico, their place of residence.

It is further stipulated and agreed, that the route between Del Norte and Rico, traveled by said witnesses and adopted as the basis of mileage fees, was via the town of Alamosa, in said State; it is further stipulated and agreed, that the said witnesses of defendants, sworn at said trial at Del Norte, have never returned to their place of residence, the said town of Rico, and since said trial have never returned in that direction of the town of Rico further than the said town of Alamosa, but on account of the distance between Pueblo and Rico, and for the purpose of attending at the said second trial of said cause at Pueblo, on the 27th day of September, 1881, the said witnesses came from said town of Alamosa, on or about the 14th day of September, 1881, and have ever since remained at said town of Pueblo, for the purpose of attending at the said second trial, and did attend the said second trial, from the commencement
38 thereof until its close, as witnesses for and on behalf of said defendants.

This stipulation does not apply to the mileage fees claimed by the witness Hollabough.

WELLS, SMITH & MACON,
THATCHER & GAST,
J. M. SAMPLE,
Att'ys for Pl'ff.

T. M. PATTERSON,
Def't Att'y.

39 And afterwards, and on, to wit, the 22d day of October, A. D. 1881, came the said Joel B. Erhardt, by Wells, Smith, and Macon, his attorneys, and filed in said court and in said cause a bond, in words and figures following, to wit:

Know all men by these presents, that we, Joel B. Erhardt, as principal, and Edwin Einstein and Siro Delmonico, as sureties, all

of the city, county, and State of New York, are held and firmly bound unto Anthony Boaro, and William L. Hull, of the county of Dolores and State of Colorado, and August Krille and Eugene B. Cushing, of the county of Las Animas, in the same State, in the penalty of two thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals, this sixth day of October, A. D. 1881.

Whereas the said Joel B. Erhardt hath prosecuted a writ of error out of the Supreme Court of the United States to review the judgment given by the circuit court of the United States for the
40 district of Colorado, at the October special term thereof, held at Pueblo, in said district, in the certain cause then in said court depending between the said Joel B. Erhardt, as plaintiff, and the said Boaro, Hull, Cushing, and Krille, as defendants:

Now, if the said Joel B. Erhardt shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make his plea good, then this obligation to be void; else in full force and virtue.

JOEL B. ERHARDT. [L. S.]
EDWIN EINSTEIN. [L. S.]
SIRO DELMONICO. [L. S.]

Witness:
WILLIAM H. CLARKSON.

Approved, Oct. 21st, 1881.
MOSES HALLETT, *Dist. Judge.*

UNITED STATES OF AMERIIA, }
Southern District of New York, } *ss:*

Edwin Einstein and Siro Delmonico, sureties on the within bond, being each first duly sworn, depose and say: That they are each worth in goods, property, and money the sum below set opposite their names, respectively, that is to say, as to Edwin Einstein more than twenty-five thousand dollars; as to Siro Delmonico, more than twenty-five thousand dollars, over and above all their just debts and liabilities, and in property subject to levy and sale upon execution.

EDWIN EINSTEIN.
41 SIRO DELMONICO.

Subscribed and sworn to before me, at the city of New York, this 13th day of October, 1881. Witness my hand and official seal.

[L. S.] WILLIAM H. CLARKSON,
Commissioner for the State of Colorado in New York, and Notary Public for New York County, N. Y.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

Be it remembered that on this 13th day of October, A. D. 1881, before me, William H. Clarkson, a notary public of the State of New

York in and for the county of New York, and a commissioner for Colorado in New York, duly commissioned and sworn and dwelling in said city of New York, personally came Joel Erhardt, Edwin Einstein, and Siro Delmonico, to me personally known to be the same persons described in and who executed the foregoing instrument and whose names are subscribed thereto, who signed and sealed the same in my presence, and acknowledged to me that they had executed the same as their free act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal.

[L. S.] WILLIAM H. CLARKSON,

42 *Notary Public for New York County, N. Y., and Commissioner for Colorado in New York.*

And afterwards, on, to wit, the 29th day of October, A. D. 1881, come the plaintiff, by Wells, Smith & Macon, his attorneys, and files in said court and in said cause a bill of exceptions, in words and figures following, to wit:

43 THE UNITED STATES, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado. Of the September Special Term, A. D. 1881. Sitting at Pueblo.

JOEL B. ERHARDT, Plaintiff,

vs.

ANTHONY BOARO, W. L. HULL, EUGENE B. CUSHING, AUGUST KRILLE, Defendants.

Be it remembered that on the 27th day of September, A. D. 1881, at this same term of the court, the issues herein joined came on to be tried before the Hon. Moses Hallett, district judge of said district, in said court presiding, and a jury.

Whereupon the said plaintiff, to maintain the said issues, produced and gave evidence tending to show that he is a native born citizen of the United States; that on the 17th day of June, 1880, one Thomas Carroll, then also a citizen of the United States, while

44 searching and exploring on behalf of himself and the plaintiff for valuable deposits of mineral, discovered in vacant, unoccupied mineral lands upon the public domain of the United States, in Pioneer Mining District, within the county of Ouray, as then constituted, but now the county of Dolores, in the State of Colorado, upon the divide between Horse Gulch and West Dolores, the outcrop of a vein or lode of quartz and other rock*ing* bearing gold and silver in valuable and paying quantities, and contained in rock in place; that by the terms of the agreement between said Carroll and plaintiff, pursuant to which the explorations of said Carroll were, at the time of said discovery, being prosecuted, all lodes and veins that said Carroll might discover were to be located one undivided fifth in the name of said Carroll and four-fifths in the name of the plaintiff.

They also introduced testimony tending to show that said Carroll, on the day of his discovery aforesaid of the said vein or lode, desig-

ignated the same the "Hawk Lode," and posted at the
45 point of said discovery of said vein or lode a plain sign or notice, in writing, in words and figures as follows, to wit:

"Hawk Lode.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein, or deposit.

"Dated June 12th, 1880.

"JOEL B. ERHARDT, $\frac{4}{5}$ths.
"THOMAS CARROLL, $\frac{1}{5}$th."

That at the point of his said discovery of the said vein said Carroll, on the 17th day of June, 1880, commenced to dig and excavate thereon a discovery shaft, and sunk the same to a depth of about eighteen inches or two feet.

That on the 30th day of June, 1880, and within less than 20 days from the day of said Carroll's discovery of said lode, in the temporary absence of said Carroll and the plaintiff from the locality of said vein or lode, and with knowledge of the right and claim of plaintiff and said Carroll in that behalf, the defendant, Anthony Boaro, entered into and took actual possession of the said excavation and working so commenced by said Carroll, removed, threw away, or concealed the stake upon which the notice aforesaid of said Car-
46 roll was written and posted, and at the said Carroll's point of discovery of said vein or lode erected a stake and posted thereon a discovery and location notice, in words as follows, to wit:

"Johnny Bull Lode.

"We, the undersigned, claim 1,500 feet on this mineral-bearing vein, running six hundred feet northeast, and 900 feet southwest, and 150 feet on each side of the same, with all its dips, spurs, angles, and variations.

"ANTHONY BOARO.
"June 30th, 1880. W. L. HULL."

That the said defendants, Hull and Boaro, entered into possession about July 21, 1880, and remained thereafter continuously in possession of the premises claimed by them and described in their said discovery notice. That threats of violence to the plaintiff and said Carroll if they should enter upon said premises, or attempt to take possession thereof were communicated to said Carroll as having been made by Boaro early in August, 1880; and that by means of such possession of the workings commenced by said Car-
47 roll, and by means of such threats of violence, said Carroll was prevented from resuming work upon or completing said discovery shaft and working, and from entering into or working upon any other part of the said lode or vein, and prevented from performing the acts of location required by law within the time limited.

The plaintiff also gave evidence tending to show that plaintiff was, during all the period of sixty days next following the discovery of said vein or lode by said Carroll, absent from the State of Colorado;

that said Carroll was authorized and instructed in behalf of plaintiff to do all work necessary to the location of this claim; and that said Carroll posted his discovery and location notice aforesaid in good faith, with the purpose and intention of taking up and locating a claim on the vein which he had discovered as aforesaid, and always thereafter intended so to do, and never abandoned this intention.

That on or about the 1st day of August, A. D. 1880, the said Carroll applied to one French, the agent of the plaintiff, at the town of Rico, near to said Hawk lode, for assistance to take possession thereof by force, which was denied to him, upon the ground that legal proceedings would be instituted for that purpose.

That within the period of sixty days from the date of the discovery of said vein by said Carroll, defendants Hull and Boaro, at the point of said discovery working commenced by said Carroll, completed an open cut exposing said vein at a depth of ten feet or more below the surface, and in a well-defined crevice bearing gold and silver in rock in place.

That within the period of ninety days from the date of the discovery of said lode by said Carroll, said French, on behalf of plaintiff and said Carroll, secretly and without the knowledge of defendants, caused the boundaries of the claim described in the complaint in this cause to be marked by six substantial posts, so set and established as to include the place of discovery of said lode by said Carroll, and the premises described in the complaint herein, hewed and marked on the sides in toward the said claim, and sunk in the ground, one at each of the four corners, and one at the center of each side line of said claim, and filed in the office of the recorder of Ouray county aforesaid a location certificate, in the name of said plaintiff & said Carroll, of their said claim as located and staked as aforesaid, setting forth the name of the said lode to wit, Hawk lode, the date of location, to wit, June 17th, 1880, the names of said Carroll and said plaintiff as the locators of said claim locating one-fifth in the name of said Carroll, and four-fifths in the name of plaintiff, the course of the said lode or vein, and such a description of the said claim with reference to natural objects and permanent land marks as would suffice to identify the same with reasonable certainty; being the same description as in the complaint herein.

The plaintiff also gave evidence tending to show that at and before the institution of this suit the said defendants were in possession of the said Hawk lode, claiming the same as the Johny Bull lode, located by said Hull and Boaro.

Thereupon the defendants' attorney moved the court to direct the jury to find the said issues in favor of the said defendants, and for cause of the said motion assigned and argued to the court—

1. That the pretended location by said Carroll was absolutely void in law, and conferred no right whatever in or to any part of the premises in controversy, inasmuch as the notice said to have been

posted by said Carroll at the point of his alleged discovery did not fix nor determine any place in particular at which any part of said claim was or was to be located or taken.

2. That if, by the acts of said Carroll in that behalf, any right was conferred upon plaintiff, the said right was equitable merely and gave no title to sustain an action at law.

3. That testimony showed that if he had discovered the lode he had abandoned it, & had not taken the steps to permit him to have advantage of def'ts' work.

But the court denied the said motion, and for the said ruling assigned reasons in the following opinion:

51 To locate a mining claim on the public land a number of things are required by the act of the State Legislature and by the act of Congress.

The first and most important is the discovery of a lode or vein. With a view to make such discovery, by the terms of the act of Congress any citizen may go upon any part of the public land and explore for the purpose of finding lodes and veins, and we have decided in many cases in this State that before a discovery of the lode or vein, and while exploring for it, the prospector has a right to any locality which he may find vacant and which he may choose to occupy for that purpose; that is to say, finding a part of the public land unoccupied, he may in that place mine for the purpose of ascertaining whether there is a lode or vein there, and while engaged in the prosecution of that work—that is, exploring for a lode or vein—he has a right to the place which he may occupy.

After the discovery of the lode or vein it is plain that he has a greater right, because he has then authority to take up any length of the lode or vein not exceeding 1,500 feet. To do so he must, in all things, comply with the requirements of the statute; he
52 must set up the boundary stakes, sink a shaft to the depth of ten feet or more, if necessary to show a well-defined crevice; he must post a notice at the point of discovery of his claim, and he must record a certificate of location containing the matters which are specified in the statute, and for doing these several things he has a period of time allowed him by statute. That period of time appears to be sixty days for sinking the shaft the necessary depth and a month additional, thirty days more, for all the other things, setting up the boundary stakes, posting his notice of discovery, and making the record; but his right to the 1,500 feet accrues to him upon the discovery of the lode. Obviously at that time he must in some manner, and in some general way, at least, indicate what portion of the lode he intends to take—that is, he must do so as to any part which is not in his actual possession and the usual course which has been practiced. There is not any method prescribed by law, so far as I know, of indicating it, but the usual practice and custom of miners has been to set up a stake at the point of
53 discovery something like that which is required by the statute and declaring his purpose to claim the lode under the law, and stating how much he will take in each direction from his discovery shaft.

It seems to me that in whatever way he may give notice of his purpose to claim a certain part and portion of the lode, if it is effectual and sufficient, that it will be enough.

If he remains upon the ground working the claim, and tells all who come to inquire of him how much he is claiming, and in what direction, I suppose that ought to be sufficient.

If he sets up his boundary stakes in the first instance, that certainly would be sufficient; if he puts up his notice at the point of discovery, asserting his claim to the lode, and declaring what part of it he will take, that also should be sufficient. That method, as I have already said, has the sanction of long usage amongst the miners of the country, and it seems to be understood by them.

In this instance it seems from the evidence, as much of it
54 as we have received, that Mr. Carroll, in exploring for a lode, claims to have discovered one at the point in controversy, and to have set up a stake there asserting his claim, but he omitted from it the parts of the lode which he would like; that is, he did not say in his notice whether he would claim any number of feet on one side or the other of his shaft.

In that respect the notice was probably insufficient. If he had remained upon the ground working the lode, as I have said before, and given notice to all who came of the parts which he would take, or if he had set up boundary stakes, indicating what part he would take, or if he had put on his stake any notice of the part of the lode which he would take, that would probably be sufficient to protect his location to the extent expressed in the notice for the time prescribed by the statute in which to do the work.

I do not see that there is anything in the statute which requires him to do the work of sinking a discovery shaft at one time or another within the sixty days. There is nothing which re-
55 quires him to go about it immediately, and to continue the work until it shall be completed. All there is in the law upon that subject is that he shall have sixty days for doing it. That upon any construction whatever which may be given to it is fulfilled, if the work is done within that time.

And I should say that going away from the claim without doing any work at that time, and not having put upon his discovery stake notice of the extent of his claim, that it could not be said to relate to more than the point at which he claims to have made the discovery; but that it did relate to that point, is in my mind quite clear; and while it may be true, *and while it may be true*, that if another sought to locate the same lode within the period of sixty days, he could be at perfect liberty to make his location at another point. I do not see that anybody could be at liberty to go upon that very place within that period of time, because Carroll had declared his purpose and his right to appropriate that place at all events, if no more. He is
56 bound to claim 1,500 feet; he could not make it two feet, ten feet, or any other number of feet within 1,500. The language of the act is, the claim shall not exceed 1,500 feet; it may be as small as the locator chooses to make it. If he went to this place

and made something of an excavation, and in that excavation erected a stake, that was declaring his purpose to locate on that lode, giving the date of his discovery, which would indicate to all who came the time within which he must do the necessary work and all the other things required by the statute to perfect the location. If he did that, it seems to me that his right to the ground covered by his excavation, at all events, within the period of sixty days was complete, and any other one coming into that place and prosecuting the work thereby excluded him from going on to do the same thing.

And whether threats were used in or about the matter in doing that to prevent him from going on with the work is not material, unless indeed the jury should be of opinion that these parties
57 would have surrendered to him upon his demand for the place and, of course, if they should come to that conclusion, it was perhaps Carroll's duty to have made such demand.

If any one goes upon the public domain to prosecute the work of exploration to find a lode, I should say that during the time he carries on his work from day to day in the usual manner, that he may recover that particular place which he has taken in that way in an action of ejectment.

The influence which counsel seems (seeks) to draw, that until the location is completed the right of the locator is an equity and not at law, is one that I cannot see any foundation whatever for. I don't understand why, in respect to a wrong of that kind, the person ousted from the place in which he may be prospecting or digging, if he has already found a lode, why he should resort to a court of equity and appeal to a chancellor to restore him to possession. I don't see why that should be a subject for equitable cognizance more than at law. I see no reason for it whatever; whatever right he
58 has is given by law, and in a sense it is as complete, as full, and as ample for the time being as the right which he secures by making a complete location under the statute. So that I should say that whether before or after the discovery of the lode, if one is ousted from the place in which he is digging, the very place where he is sinking his shaft, making his cut, or his opening, whatever the character of the work may be—if he is ousted from that place, he may have his action at law, and that a jury is the proper body to decide the question in issue between the parties.

Now, upon what I have said, if it be true, as the testimony of the witnesses for the plaintiff seems to show, that there was a lode discovered in that place, and a stake was put up there, asserting the right of the locator to take it, giving the date of the discovery, thus showing the time within which the work necessary to a complete location would have to be done—if all that was done, as claimed by the witnesses for the plaintiff, any one coming upon that ground, and upon that very place, taking possession of that particular shaft, opening, or cut within that time, it may be said invaded the
59 possession of the locator; and it does not lie with him afterwards to object that the location was not made complete by the sinking of a shaft ten feet deep, and doing the other things which are required by statute.

Counsel for the defendant argues that it is necessary to assume on behalf of plaintiff in this action that the work done by the defendants inures to the benefit of the plaintiff; that it must appear that plantiff has done this work in some form, and that in order to make it so appear plaintiff must take the position before the court that the work done by the defendant inures to the benefit of the plaintiff; that it must appear that plaintiff has done this work in some form, and that in order to make it so appear plaintiff must take the position before the court that the work done by defendants was for his benefit. That is not the position at all. The position is that the defendants, if it be true that they went into the very place where the discovery was made, into the very cut and opening which the locator proposed to take, and did work there, thereby pre-
60 venting the locator from doing work in that place, estopped themselves from saying that the work was not done by the locator.

I should say, also, that they coould not take advantage of any other defect in the location if there had been no record made within the time, nor boundary stakes set up, nor anything done as required by statute, it would not be competent for them to say that it had not been done. Having interrupted him by their unlawful intrusion into the place, having interrupted the work of making development on the claim, it is not competent for them to say that it is not done.

We do not assume that any of this work done by the defendants is done for or on behalf of, or stands now to the credit of, the plaintiff in the suit. All we say to these parties is, they are estopped to deny that it is done. That reasoning applies to the dimensions of the claim also. It is not competent for the defendants to say, if they have taken possession of the very work of the plaintiff after he made a location there, that the location is defective in any way. All that that I have said on that subject is subject to the condition
61 that the jury must find that the defendants had knowledge of this location; that the means taken by the plaintiff or by Carroll in making the location were sufficient and effectual to give them notice of the location; and then, if they find that having such knowledge defendants went into the place which had been appropriated by the locator into the opening, and appropriated that to their own use, made it the basis of a location by themselves of the same territory, upon that they are estopped to deny that any of the requisites of a valid location exists on behalf of the locator.

It applies to the extent of territory claimed by plaintiff; that is, of course, within what one may lawfully claim. It is not competent for them to say, it is true we ousted you from the shaft, but your location was not then complete, and therefore you shall have nothing. If defendants took possession of Carroll's work, and held it so as to prevent him from going on with it, we may assume on the part of the plaintiff for the purpose of this action, that everything requisite and necessary to a valid location was done by him.

62 As to what was said by counsel in respect to the pleadings in the cause that it is necessary for the plaintiff to set forth

exactly how he claims the details of his claim, that perhaps would be true in some general way, according to the manner of pleading pointed out in this case, if the code did not prescribe a form of complaint in an action of ejectment. It prescribes specifically what a complaint in ejectment shall contain, as that it shall set forth the nature and extent of the estate, whether in fee or for life, and so on, and whether he claims the right to possess and occupy under the laws of the United States and the State, and complying with the statute in respect to this action is sufficient, and it is not necessary that the plaintiff should go beyond the statute, or to declare more specifically than the statute itself requires.

I suppose this is in the nature of a motion for a non-suit, which will be denied.

Whereupon the defendants, to maintain the said issues on their part, introduced evidence tending to disprove the facts, in proof of which the plaintiff had offered evidence, and also tending
63 to show that on the 30th day of June, 1880, when the defendant, Anthony Boaro, entered upon the ground in controversy, he found nothing on the surface to indicate a lode, nor any such excavation nor stake as that claimed by the plaintiff to have been made and posted by said Carroll. That upon the whole territory claimed by defendants, and which embraces a great portion of the claim claimed by said Carroll and plaintiff, there was nothing whatever at the time aforesaid upon the premises in controversy to indicate that it had ever previously been located or claimed.

Defendants also gave evidence tending to show that their discovery cut was commenced where no excavation had previously been made, and at a point thirty-five feet distant from the point described and claimed by said Carroll in his testimony as the point at which he had begun to sink the discovery shaft of said Hawk lode, and had erected his stake and posted his notice as above mentioned, and that the top of the vein was at least 4 feet below the surface.

64 And also gave evidence tending to show that said Carroll had abandoned all claim to the premises in controversy, and that the omission of said Carroll to perform the location work upon the said Hawk lode was due to such abandonment, and not to any threats of defendants, or either of them, or to the alleged occupation by defendants, Hull & Boaro, or either of them, of the alleged workings or shaft commenced by said Carroll. The defendants also, as tending to show such abandonment, gave evidence that neither plaintiff nor said Carroll, until the latter part of October or the fore part of November, 1880, nor until by their workings the said claim was shown to be valuable, ever demanded possession of the said premises or asserted any title thereto.

The defendants also gave evidence tending to show that the said Hull and Boaro commenced work upon their said claim, called the Johnny Bull lode, on or about the 21st day of July, A. D. 1880, and not before, and sunk and excavated an open cut, cutting the vein of a lode at the depth of ten feet or more, and exposed therein
65 a vein of rock in place, bearing gold and silver; that no mineral nor indications of a vein or lode were found until they

reached the depth of seven or eight feet, and that subsequently, and within the time limited by law, they marked the bounds of their claim on said lode, called by them the Johnny Bull lode, in all things as required by law, and recorded the same in the office of the recorder of said Ouray county, by a location certificate sufficiently describing the said claim by reference to natural monuments, and in all respects complying with the requirements of the law.

That plaintiff, Erhardt, was not in the State of Colorado from June 17, 1880, to October, 1880.

That defendants, Hull & Boaro, at time of discovery of Johnny Bull location and thereafter were citizens.

This was all the testimony produced herein or given to the jury by either party upon the trial of said issues.

And thereupon the said plaintiff prayed the court to instruct the jury as follows, to wit:

66 1. First. "Under the law, before a discovery of the lode or vein, and while exploring for it, the prospector has a right to any locality he may find vacant and which he may choose to occupy for that purpose; that is to say, finding a part of the public land unoccupied, he may in that place mine for the purpose of ascertaining whether there is a lode or vein there, and while engaged in the prosecution of that work, that is exploring for a lode or vein, he has a right to the place which he may occupy. A prospector having commenced to prospect at a certain point on the public domain, and having discovered a vein therein, has by statute sixty days in which to sink a shaft to the depth of ten feet, or deeper if necessary, to shew a well-defined crevice. Any one who may enter upon the very place he has dug, and made a discovery before the sixty days expire, must be treated as a trespasser, provided the prospector had in some efficient way indicated to the world his appropriation of the discovery hole for the purpose of prosecuting his work as by law required.

67 If the jury believe from the evidence that Thomas Carroll, on the 17th day of June, A. D. 1880, in behalf of himself and the plaintiff in this action, entered upon the public domain at the point where the Johnny Bull shaft is now sunk, and then and there made an excavation uncovering a mineral vein, and therein set up a stake upon which was written his name and the name of the plaintiff as discoverers, the name of the lode as Hawk lode, and the date of the discovery as June 17th, A. D. 1880, these several acts would give Carroll and the plaintiff the right to the possession of said discovery hole for the statutory period of sixty days within which to sink the shaft to a sufficient depth—ten feet or more—to show a well-defined crevice of mineral."

But the court refused to charge the jury as prayed as aforesaid, and to this ruling and opinion of the court, refusing to charge the jury as prayed as aforesaid, the plaintiff then and there excepted.

The said plaintiff also prayed the court to charge the jury in these words, to wit:

1. Second. If the jury believe from the evidence that the several acts above mentioned were performed by Thomas Carroll, you

exactly how he claims the details of his claim, that perhaps would be true in some general way, according to the manner of pleading pointed out in this case, if the code did not prescribe a form of complaint in an action of ejectment. It prescribes specifically what a complaint in ejectment shall contain, as that it shall set forth the nature and extent of the estate, whether in fee or for life, and so on, and whether he claims the right to possess and occupy under the laws of the United States and the State, and complying with the statute in respect to this action is sufficient, and it is not necessary that the plaintiff should go beyond the statute, or to declare more specifically than the statute itself requires.

I suppose this is in the nature of a motion for a non-suit; which will be denied.

Whereupon the defendants, to maintain the said issues on their part, introduced evidence tending to disprove the facts, in proof of which the plaintiff had offered evidence, and also tending
63 to show that on the 30th day of June, 1880, when the defendant, Anthony Boaro, entered upon the ground in controversy, he found nothing on the surface to indicate a lode, nor any such excavation nor stake as that claimed by the plaintiff to have been made and posted by said Carroll. That upon the whole territory claimed by defendants, and which embraces a great portion of the claim claimed by said Carroll and plaintiff, there was nothing whatever at the time aforesaid upon the premises in controversy to indicate that it had ever previously been located or claimed.

Defendants also gave evidence tending to show that their discovery cut was commenced where no excavation had previously been made, and at a point thirty-five feet distant from the point described and claimed by said Carroll in his testimony as the point at which he had begun to sink the discovery shaft of said Hawk lode, and had erected his stake and posted his notice as above mentioned, and that the top of the vein was at least 4 feet below the surface.

64 And also gave evidence tending to show that said Carroll had abandoned all claim to the premises in controversy, and that the omission of said Carroll to perform the location work upon the said Hawk lode was due to such abandonment, and not to any threats of defendants, or either of them, or to the alleged occupation by defendants, Hull & Boaro, or either of them, of the alleged workings or shaft commenced by said Carroll. The defendants also, as tending to show such abandonment, gave evidence that neither plaintiff nor said Carroll, until the latter part of October or the fore part of November, 1880, nor until by their workings the said claim was shown to be valuable, ever demanded possession of the said premises or asserted any title thereto.

The defendants also gave evidence tending to show that the said Hull and Boaro commenced work upon their said claim, called the Johnny Bull lode, on or about the 21st day of July, A. D. 1880, and not before, and sunk and excavated an open cut, cutting the vein of a lode at the depth of ten feet or more, and exposed therein
65 a vein of rock in place, bearing gold and silver; that no mineral nor indications of a vein or lode were found until they

reached the depth of seven or eight feet, and that subsequently, and within the time limited by law, they marked the bounds of their claim on said lode, called by them the Johnny Bull lode, in all things as required by law, and recorded the same in the office of the recorder of said Ouray county, by a location certificate sufficiently describing the said claim by reference to natural monuments, and in all respects complying with the requirements of the law.

That plaintiff, Erhardt, was not in the State of Colorado from June 17, 1880, to October, 1880.

That defendants, Hull & Boaro, at time of discovery of Johnny Bull location and thereafter were citizens.

This was all the testimony produced herein or given to the jury by either party upon the trial of said issues.

And thereupon the said plaintiff prayed the court to instruct the jury as follows, to wit:

66 1. First. "Under the law, before a discovery of the lode or vein, and while exploring for it, the prospector has a right to any locality he may find vacant and which he may choose to occupy for that purpose; that is to say, finding a part of the public land unoccupied, he may in that place mine for the purpose of ascertaining whether there is a lode or vein there, and while engaged in the prosecution of that work, that is exploring for a lode or vein, he has a right to the place which he may occupy. A prospector having commenced to prospect at a certain point on the public domain, and having discovered a vein therein, has by statute sixty days in which to sink a shaft to the depth of ten feet, or deeper if necessary, to shew a well-defined crevice. Any one who may enter upon the very place he has dug, and made a discovery before the sixty days expire, must be treated as a trespasser, provided the prospector had in some efficient way indicated to the world his appropriation of the discovery hole for the purpose of prosecuting his work as by law required.

67 If the jury believe from the evidence that Thomas Carroll, on the 17th day of June, A. D. 1880, in behalf of himself and the plaintiff in this action, entered upon the public domain at the point where the Johnny Bull shaft is now sunk, and then and there made an excavation uncovering a mineral vein, and therein set up a stake upon which was written his name and the name of the plaintiff as discoverers, the name of the lode as Hawk lode, and the date of the discovery as June 17th, A. D. 1880, these several acts would give Carroll and the plaintiff the right to the possession of said discovery hole for the statutory period of sixty days within which to sink the shaft to a sufficient depth—ten feet or more—to show a well-defined crevice of mineral."

But the court refused to charge the jury as prayed as aforesaid, and to this ruling and opinion of the court, refusing to charge the jury as prayed as aforesaid, the plaintiff then and there excepted.

The said plaintiff also prayed the court to charge the jury in these words, to wit:

1. Second. If the jury believe from the evidence that the several acts above mentioned were performed by Thomas Carroll, you

68 are instructed that Boaro and Hull could initiate no right at the same point by occupying the point of discovery until the expiration of sixty days therefrom.

But the court refused to charge the jury, as prayed as aforesaid, and to this ruling and opinion of the court, refusing to charge the jury, as prayed as aforesaid, the plaintiff then and there excepted.

The said plaintiff also prayed the court to charge the jury in these words, to wit:

3. Third. "If the jury believe from the evidence that Mr. Carroll, in exploring for a vein of mineral, discovered one at the point in controversy, and set up his stake asserting his claim thereto, in the manner mentioned in his testimony, that is sufficient to entitle him to the exclusive possession of the very excavation at the point of discovery for the full period of sixty days."

But the court refused to charge the jury, as prayed as aforesaid; and to this ruling and opinion of the court refusing to charge the jury, as prayed as aforesaid, the plaintiff then and there excepted.

69 The said plaintiff also prayed the court to charge the jury in these words, to wit:

4. Fourth. "The defendants admit and aver in their answer that Boaro, June 30th, at the point of discovery on the claim known as Johnny Bull, discovered a vein in rock in place.

By this admission they are bound, and their own witnesses cannot be permitted to contradict it."

But the court refused to charge the jury, as prayed as aforesaid; and to this ruling and opinion of the court refusing to charge the jury, as prayed as aforesaid, the plaintiff then and there excepted.

The said plaintiff also prayed the court to charge the jury in these these words, to wit:

5. Fifth. "A demand of the premises after they were in possession of Boaro and Hull was not necessary, unless the jury believe from the evidence that if such demand had been made the defendants would have peaceably surrendered the possession thereof."

70 But the court refused to charge the jury, as prayed as aforesaid; and to this ruling and opinion of the court refusing to charge the jury, as prayed as aforesaid, the plaintiff then and there excepted.

The said plaintiff also prayed the court to charge the jury in these words, to wit:

6. Sixth. "The court instructs the jury that the law never requires the performance of an idle act, and that no influence unfavorable to the plaintiff's claim can be drawn from Carroll's failure to demand of Hull and Boaro possession of the premises in controversy if they believe, from the evidence, that such demand, if made, would have been unavailing."

But the court refused to charge the jury, as prayed as aforesaid; and to this ruling and opinion of the court refusing to charge the jury, as prayed as aforesaid, the plaintiff then and there excepted.

The said plaintiff also prayed the court to charge the jury in these words, to wit:

7. Seventh. "The court instructs the jury that from and
71 after the date of the discovery by a citizen of the United States upon its vacant unoccupied mineral lands of the outcrop of a vein or body of mineral-bearing rock, the discoverer is entitled to the possession of the point at which he made his discovery, and of such reasonable amount of adjacent ground as is necessary or incidental to the proper prosecution of work for opening up and exposing the vein or body of mineral-bearing rock to the depth and within the time required by law; and to such extent he is protected by law in his possession for the period of sixty days from the date of his discovery."

But the court refused to charge the jury, as prayed as aforesaid; and to this ruling and opinion of the court refusing to charge the jury, as prayed as aforesaid, the plaintiff then and there excepted.

The said plaintiff also prayed the court to charge the jury in these words, to wit:

8. Eighth. "The court instructs the jury that upon the date
72 of the discovery upon vacant and unoccupied mineral lands of the United States of a vein or body of mineral-bearing rock, or the outcrop of a vein or body of mineral-bearing rock, by a citizen of the United States, or one who has declared his intention to become such, the discoverer becomes entitled to claim 1,500 feet on such vein or body of mineral-bearing rock along the course thereof, and he is not required to designate or give notice of the course and direction of the claim which he intends to take up and locate thereon on the day of his discovery, nor until filing his location certificate."

But the court refused to charge the jury, as aforesaid; and to this ruling and opinion of the court refusing to charge the jury, as prayed as aforesaid, the plaintiff then and there excepted.

Thereupon the court charged the jury as follows, to wit:

1. The first question for the consideration of the jury is as to the discovery of a lode or vein of silver-bearing ore by Carroll at the place in controversy. It is incumbent on the plaintiff to show
73 by preponderance of testimony that such discovery was made.

On this point there is the testimony of Carroll as to what he found there, and some evidence on both sides as to the condition of the ground in that locality. The position of the plaintiff is that the lode cropped out at that place, and was clearly disclosed by the slight work with a pick, which Carroll testifies to.

The position of the defendants is that there was not on the surface of the ground any indications of a lode, and that it was necessary to make a considerable excavation to reach the lode. They also claim that there was no excavation whatever, such as mentioned by Carroll, at the place in controversy, at and before the time of the location by Boaro.

This point, on which the testimony is conflicting, you are to determine; and if upon that you find for the plaintiff, you should proceed to the matters herein stated.

If on that point you find for defendant, your verdict will be for them on that alone, without reference to any other matter.

2. If you find the first point for plaintiff, a further ques-

71 tion for your consideration is as to the posting of notice at the point of discovery.

It is incumbent on the plaintiff to show by preponderance of testimony, as before stated, that a notice of the discovery and of the claim of the locator was put up at the point of discovery; notice in any other form would be as effectual, probably; but as the plaintiff claims that the notice was posted on the claim, it is only necessary to consider whether that method was adopted. Carroll testifies that he posted a notice in his excavation at the point of discovery, and there is some evidence of admissions or declarations by Boaro to the effect that he found a stake there when he went on the ground. The defendants claim that no such notice was posted and none found there by Boaro when he made his location. This is a controverted question similar to the first stated, which you are to determine on the evidence. If you find that notice was posted, as testified by Carroll, you should also find that it was sufficient for the purpose for which it was designed with this modification. It

75 is in evidence, and it seems to be conceded by plaintiffs, that the notice on the stake contained no specification or description of the territory claimed by the locators; as that they claimed a number of feet on each side of the discovery or in any direction therefrom. In this respect the notice was deficient, and under it the locators could not claim more than the very place in which it was planted elsewhere on the same lode or vein; if it extended beyond the place in controversy, any other citizen could make a valid location, for this notice, specifying no bounds or limits, cannot be said to have any extent beyond what would be necessary for sinking a shaft.

3. If you find these matters for the plaintiff, a third question for your consideration is whether defendant, Boaro, in making the location under which defendants' claim, went into the slight excavation made by Carroll, and there sunk his own discovery shaft or run his own cut, making that the basis of defendants' location.

If he did so, the plaintiff, having then a right to that locality,

76 as before explained, the entry of Boaro was an intrusion into his territory for which he may maintain this action. But it should appear to you, from the evidence, that Boaro entered at the very place which had been previously taken by Carroll.

Because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted. Possibly, the rule here laid down may be applicable to the case in which a subsequent locator may sink his discovery shaft so near to that of the first locator as to prevent further work by the latter in the development of the claim. But it is not necessary to divert to that matter, for the plaintiff contends that Boaro went into the very place where Carroll made his excavation and planted his discovery stake, and there made a cut, shaft, or other opening on which to found his own location. That is the question in issue between the parties, and you should decide it on the evidence.

4. These things being found for the plaintiff, a fourth ques-

77 tion for your consideration is whether Carroll, after discovering the lode, abandoned it.

To perfect their location it was incumbent on the plaintiff and Carroll, as the locators of the claim, to sink a discovery shaft within sixty days after the date of location, and to do the other things required by statute within ninety days from that date. Failing in that, they would have no right whatever to the territory in controversy. And although Carroll may have intended to do the necessary work and to perfect the location within the time limited by statute at the time he set his stake, if he afterwards abandoned the intention, the plaintiff cannot recover.

It should appear to you from the evidence that the plaintiff and Carroll, at the time the Hawk location was made, and continuously thereafter, held and maintained the purpose and intention to complete the location, and that they were prevented from doing so by the act of Boaro and Hull in taking possession of the place in controversy and excluding Carroll and the plaintiff therefrom.

78 If, by the use of reasonable diligence, the plaintiff and Carroll could have obtained possession for the purpose of doing the necessary work, it was their duty to use such diligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand. But they were not bound to attempt to do the work at any other place than that which had been selected by Carroll, nor were they bound to use force to gain possession or even to bring an action therefor.

If they were excluded by Boaro and Hull from the possession of the very place selected by Carroll for his discovery cut or shaft with intent on the part of the latter to hold the ground against them, it is enough on this point.

5. These several questions must be found for plaintiff by preponderance of testimony to support a verdict in his favor. For, if after one has discovered a lode and set up a notice of his claim to it, and within the time fixed by law for doing the work necessary to

79 a valid location, another coming to the same place and taking possession thereof to the exclusion of the first shall not have advantage of his own wrong. Nor shall the subsequent locator in such case be permitted to allege anything against the right of the first locator. To permit the junior locator to deny the right of the other under such circumstances would be to deny him all remedy, which cannot be allowed. And, therefore, if the fact mentioned as established by the evidence, the regularity and validity of plaintiff's location shall be assumed.

And if upon the evidence you affirm the foregoing propositions for the plaintiff, your verdict should be for him. If you deny any or all of these, you should find for defendants.

And the said plaintiff then and there excepted to that part of the charge of the court in words as follows, to wit:

"It is in evidence, and it seems to be conceded by plaintiff, that the notice on the stake contained no specification or descrip-

80 tion of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in

any direction therefrom. In this respect the notice was deficient, and under it the locators could not claim more than the very place in which it was planted. Elsewhere on the same lode or vein, if it extended beyond the place in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, cannot be said to have any extent beyond what would be necessary for sinking a shaft."

And the said plaintiff also then and there excepted to so much of said charge of the court as is in these words, to wit:

"But it should appear to you from the evidence that Boaro entered at the very place which had been previously taken by Carroll, because as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other
81 place than that in which it was planted."

And the said plaintiff then and there also excepted to that part of the charge of the court in words as follows, to wit:

"And although Carroll may have intended to do the necessary work and to perfect the location within the time limited by statute at the time he set his stake, if he afterwards abandoned the intention the plaintiff cannot recover. It should appear to you from the evidence that the plaintiff and Carroll at the time the Hawk location was made and continuously thereafter held and maintained the purpose and intention to complete the location, and that they were prevented from doing so by the act of Boaro and Hull in taking possession of the place in controversy and excluding the plaintiff and Carroll therefrom."

And the said plaintiff then and there also excepted to that
82 part of the charge of the court in words as follows, to wit:

"These several questions must be found for plaintiff by preponderance of testimony to support a verdict in his favor."

And the plaintiff also then and there excepted to that part of the charge of the court as is in words as follows, to wit:

"If, by the use of reasonable diligence, the plaintiff and Carroll could have obtained possession for the purpose of doing the necessary work, it was their duty to use such diligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand."

Thereupon the jury returned a verdict in behalf of the said defendant, and judgment was given thereon; that the defendants go without day, and recover of and from the said plaintiff their costs.

83 And because these several matters do not appear by the record herein, the said plaintiff brings this his bill of exceptions, and prays his honor, the judge in this court presiding herein, to sign and seal the same and make it part of the record herein; which is done accordingly.

(Signed) MOSES S. HALLETT, [L. S.]
Dist. Judge.

84 And afterwards and on, to wit, the 29th day of October, A. D. 1881, come the plaintiff, by Wells, Smith & Macon, his

attorneys, and file in said court and in said cause a stipulation in words and figures following, to wit:

Ejectment.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States for the District of Colorado.
Sitting at Pueblo.

JOEL B. ERHARDT, Plaintiff,
vs.
ANTHONY BOARO *et als.*, Defendants.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that on the 29th day of September, 1881, during the trial of said cause, the plaintiff took leave to file therein an amended complaint, differing from the original in this, to wit: That said amended complaint demanded and claimed the undivided four-fifths of the premises in said original complaint mentioned, instead of the whole thereof; that said amended complaint was prepared and handed to the clerk, but by mistake was not filed nor entered;
85 and it is further stipulated and agreed that the said clerk of said court may mark filed and entered as of said 29th day of September, 1881, the said amended complaint supposed to be now in his hands, or one of the same purport therewith, and that this stipulation be duly incorporated into the record in said cause and transcribed as part thereof, in pursuance of the writ of error sued out and filed in said court, and that the original answer stand without objection as and for an answer to said amended complaint.

October 24, 1881.

MARKHAM & PATTERSON,
Attorneys for Defendants.
WELLS, SMITH & MACON AND J. M. SEMPLE,
Att'ys for Plaintiff.

The clerk will note the amendment according to this stipulation.
MOSES HALLETT.

The amended bill of complaint above referred to, filed as of Sept. 29th, 1881, on October 29th, 1881, and said amended bill of complaint being in words and figures following, to wit:

86 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States for the District of Colorado.

JOEL B. ERHARDT, Plaintiff,
vs.
ANTHONY B-ARO, W. L. HULL, EUGENE B. CUSHING, AUGUST KRILLE, and —— HOLLABAUGH, Defendants.

The plaintiff complains in this his amended complaint, filed by leave of court, of the said defendant, for that heretofore, to wit, on the 17th day of June, 1880, the plaintiff was possessed of four undi-

vided one-fifths of that certain mining claim situated in the county of Dolores, then the county of Ouray, in the State of Colorado, and within the said district, located and known as the Hawk lode, in Pioneer Mining District, being 1,500 linear feet, horizontal measurement, in length, by 300 feet in width, situate upon the divide between Horse Gulch and the West Dolores river, about four
87 and one-half miles northwesterly from the town of Rico, in the said county of Dolores, bounded and described as follows, to wit:

Beginning at corner number one, a well-marked post, being the northeast corner of said claim, whence bear spruce post, six inches in diameter, S. 2° E. three feet distant; Elliot Mountain north 67° 25′ east, and Monument Peak north 42° 35′ east; thence west 300 feet to northwest corner No. 2; thence south 750 feet to west side center post, and 1,500 feet to southwest corner No. 3, whence bears a prominent peak north 37° E., and spruce post 15 inches in diameter north 72° west 20 ft. distant; thence east 300 feet to southeast corner No. 4, whence bears spruce post 15 inches in diameter south 55° east 5 feet distant; thence north 750 feet to east side center post, and 1,500 feet to northeast corner No. 1, the place of beginning.

From the discovery shaft Expectation Mountain bears south 39° 5′ east.

Which said four undivided one-fifths of said premises plaintiff is entitled to occupy and possess by virtue of the location thereof, in pursuance of the laws of the United States and of the State of Colo-
rado, and the local laws, rules, and customs of miners
88 of the said Pioneer Mining District, and by virtue of the actual prior possession thereof.

And the said plaintiff being so possessed of the said four undivided one-fifths of said premises and entitled thereto, the said defendants afterwards, to wit, on the 30th day of June, A. D. 1880, wrongfully entered into said premises and ousted the plaintiff, and now unlawfully withholds from the plaintiff possession thereof, to the damage of plaintiff in fifty thousand dollars.

And the plaintiff says that he, the said plaintiff, is a citizen and resident of the State of New York, and that the said defendants are, and each of them is, a citizen and resident of the State of Colorado; that the said four undivided fifths of said premises exceed five thousand dollars in value.

2. And for a second cause of action plaintiff saith that heretofore, to wit, on the 17th day of June, A. D. 1880, the said plaintiff being possessed of the four undivided one-fifths of the same premises in the first cause of action before described, the said defendants, to wit, on the 30th day of June, A. D. 1880, wrongfully entered into pos-
session thereof and ousted the plaintiff, and began to work
89 and mine therein and dug and removed therefrom divers large quantities of gold and silver bearing ore, to wit, two hundred tons, or thereabouts, of great value, to wit, of the value of fifty thousand dollars, to the damage of the plaintiff in fifty thousand dollars.

And the plaintiff further saith that the said plaintiff is a citizen

and resident of the State of New York, and that the said defendants are, and each of them is, a citizen and resident of the State of Colorado.

Wherefore the plaintiff prays judgment against the defendants for the possession of the said four undivided one-fifths of said premises, and for one hundred thousand dollars, his damages as aforesaid, and his costs.

M. B. CARPENTER,
JAS. M. SAMPLE,
WELLS, SMITH & MACON,
Pl'ff's Att'ys.

90 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of all proceedings had and of all papers filed in a certain cause heretofore depending in said court, in ejectment, wherein Joel B. Erhardt is plaintiff and Anthony Boaro, W. L. Hull & others are defendants, the citation to defendants and writ of error being hereto attached, marked "A" & "B."

Witness my hand and the seal of said circuit court, at the city of Pueblo, in said district, this 29th day of October, A. D. 1881.

[SEAL.] EDWARD F. BISHOP, *Clerk,*
By MARK G. BRADFORD,
Deputy Clerk.

91 "A."

Citation, U. S. Circuit Court.

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to Anthony Boaro, W. L. Hull, Eugene B. Cushing, and August Krille, Greeting:

You are hereby cited and admonished to be and appear at the term of the Supreme Court of the United States, now sitting at Washington, on the third Monday of said term, being the 24th day of October instant, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, at Pueblo, wherein Joel B. Erhardt is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallet, judge of the circuit court of the United States for the district of Colorado, this 21st day of October, in the year of our Lord one thousand eight hundred and eighty-one.

MOSES HALLET, *Judge.*

Rec'd a copy hereof this Oct. 22, 1881.

MARKHAM & PATTERSON,
Att'ys for Def'ts.

92 *Proof of Service.*

THE UNITED STATES OF AMERICA, } ss:
State [and] District of Colorado, County of Arapahoe, }

On this 22d day of October, A. D. 1881, personally appeared E. T. Wells before me, the subscriber, a notary public of the county of Arapahoe aforesaid, and makes oath that he delivered a true copy of the within citation to Vincent D. Markham, Esq., one of the firm of Markham & Patterson, the attorneys of the defendant in the within-mentioned cause, at the office of said Markham & Patterson, in Denver, in said district, this October 22, A. D. 1881.

E. T. WELLS.

Sworn to and subscribed before me, this 22d day of October, A. D. 1881. Witness my hand & notarial seal.

[SEAL.] JOHN H. CLARK,
Notary Public.

[Endorsed:] Gen. No. —. —— court of the United States, district of Colorado. ——, plaintiff in error, *vs.* ——, defendant in error. Citation. Filed in —— court of the U. S., this — day of ——, A. D. 18—. ——, clerk, by ——, deputy clerk. ——, attorney for plaintiff in error.

93 "B."

Writ of Error to Circuit Court U. S., District of Colorado.

The United States of America.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between Joel B. Erhardt, plaintiff, and Anthony Boaro, W. L. Hull, Eugene B. Cushing, and August Krille, defendants, manifest error hath happened, to the great damage of the said Joel B. Erhardt, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the 24th day of October instant, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme

Court of the United States, this 21st day of October, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*
By MARK G. BRADFORD, *Deputy Clerk.*

Allowed by—

MOSES HALLETT, *Judge.*

94 *Return.*

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Honorable Supreme Court of the United States, at the city of Washington, D. C., a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Pueblo, in said district, this 29th day of October, A. D. 1881.

[SEAL.] EDWARD F. BISHOP, *Clerk.*
By MARK G. BRADFORD, *Deputy Clerk.*

[Endorsed:] Gen. No. —. —— court of United States. Joel B. Erhardt, plaintiff in error, *vs.* Anthony Boaro *et al.* Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 22d day of October, A. D. 1881. Edward F. Bishop, clerk, by Mark G. Bradford, deputy clerk. Wells, Smith & Macon, attorneys for plaintiff in error.

Endorsed on cover: Colorado C. C. U. S. No. 158. Joel B. Earhardt, plaintiff in error, *vs.* Anthony Boaro, W. L. Hull, Eugene B. Cushing, and August Krille. Filed 14th November, 1881.